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Fernrite Sdn Bhd v Perbadanan Nasional Bhd

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02()-18 OF 2011(W)
ARIFIN ZAKARIA CHIEF JUSTICE, HASHIM YUSOFF AND ABDULL HAMID EMBONG FCJJ
31 OCTOBER 2011

Contract — Construction of terms of agreement — Intention of parties — Sale and purchase of shares — Shares registered in name of purchaser defendant — Defendant failed to pay purchase price — Plaintiff claimed for dividends paid for shares — Whether legal and beneficial interest in shares passed to defendant — Whether defendant's only remedy was for purchase price of shares — Whether general release clause in settlement agreement would bar plaintiff from making claim for dividends

On 19 August 1996, Perbadanan Nasional Bhd ('the plaintiff') entered into an agreement ('the principal agreement') to sell its shares in Pernas International Holdings Bhd ('the shares') to Fernrite Sdn Bhd ('the defendant') for the total sum of RM408,568,312.80 (the purchase price). This sale of the shares to the defendant was part of a management buyout offer by the defendant who was managing the hotels which formed the core business of the plaintiff. Under the terms of the principal agreement, the shares were registered in the name of the defendant on a deferred payment basis against delivery of an irrevocable bank guarantee for the purchase price. It was a term of the principal agreement that the purchase price would be paid in full within twelve months from the completion date, ie on or before 16 October 1997. On 16 October 1996, the subject shares were registered in the name of the defendant on the understanding that the defendant would pay the purchase price on the agreed date. However, the defendant failed to make such payment and the parties entered into a supplemental agreement on 14 October 1997 ('the first SA') whereby the plaintiff granted the defendant an extension of one year, ie 16 October 1998, to pay up. However, before the due date, the parties entered into a second supplemental agreement ('the second SA'), whereby the defendant was granted yet another year's extension ie 16 October 1999 to pay the purchase price and an interest sum of RM19,882,815.31. When the defendant failed to meet this commitment to make payment of the purchase price, the parties entered into a settlement agreement on 22 October 2001. It was a term of this agreement that the sale and purchase of the shares was terminated and that the defendant re-transfer the shares to the plaintiff. During the period between 1996 and 2001, the defendant had received the total sum of RM100,527,73512 as dividends from the shares. The plaintiff then filed an originating summons against the defendant wherein it sought, inter alia, a

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declaration that the defendant was holding the shares on trust for and on behalf of the plaintiff for the period August 1996 to 7 December 2001 ('the relevant period'); a declaration that that any sums received by the defendant as dividends on the shares were held by the defendant as constructive trustee for the plaintiff; and that the defendant pay over all dividends it had received from the shares during the relevant period to the plaintiff. When the High Court granted the plaintiff the relief it sought, the defendant appealed to the Court of Appeal. The Court of Appeal dismissed the appeal. Both the High Court and the Court of Appeal held that it was highly unconscionable that the defendant laid a claim on the dividends attached to the shares during the relevant period when it had not paid for the shares. As such, these two courts had ruled that the plaintiff as beneficial owner of the shares was entitled to the dividends from the shares during the relevant period. The defendant then obtained leave to proceed with the present appeal against the decision of the Court of Appeal. The defendant contended that upon furnishing the bank guarantee to the plaintiff, the transaction was completed and the plaintiff was to transfer the shares to the defendant. As such the defendant argued that both the legal and beneficial interest in the shares had passed to the defendant and that the plaintiff was only entitled to the purchase price of the shares and not the dividends. The defendant relied on s 55 of the Sale of Goods Act 1957 ('SOGA') to support this contention.

Held, dismissing the appeal with costs:

(1) Under the principal agreement, the defendant was required to furnish the plaintiff a bank guarantee for an amount equivalent to the purchase price but this bank guarantee would be returned to the defendant upon payment of the full purchase price. Thus the bank guarantee was only a form of security for payment of the full purchase price and was not intended to be treated as payment of the full purchase price. Further the principal agreement also provided that if the defendant defaulted in making full payment of the purchase price, the plaintiff was entitled to terminate the agreement and that upon such termination the defendant shall transfer the shares back to the plaintiff (see para 20).

(2) As a general rule the shares should become in equity the property of the defendant purchaser once the contract for the sale is executed. However, this rule would not apply to the present case. This was because from the general tenor of the agreement, it was never the intention of the parties that the beneficial interest in the shares was to pass to the defendant without full payment of the purchase price by the defendant (see para 22).

(3) In order for s 55 of the SOGA to apply, the property in the goods should pass to the defendant purchaser. However, in the present case, it was evident that the shares were never intended to pass to the defendant, save

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upon payment of the full purchase price. Therefore, s 55(1) of the SOGA could not apply to this case (see paras 25–26).

(4) The defendant's contention, that since the settlement agreement was silent on the issue of past dividends received by the defendant from the shares, it was the intention of the parties to allow the defendant to keep the dividends received prior to the date of the settlement agreement, could not stand. It was found that since the defendant did not have any beneficial interest in the shares he could not claim beneficial interest in the dividends. Thus any agreement to extinguish the plaintiff's right to the dividends ought to be expressed in clear and unequivocal terms in the settlement agreement and a general release clause would not bar the plaintiff from making a claim to the dividends (see para 28).

[Bahasa Malaysia summary

Pada 19 Ogos 1996, Perbadanan Nasional Bhd ('plaintif') telah memeterai perjanjian ('perjanjian utama') untuk menjual saham-sahamnya di Pernas International Holdings Bhd ('saham-saham tersebut') kepada Fernrite Sdn Bhd ('defendan') untuk jumlah sebanyak RM408,568,312.80 ('harga belian'). Jualan saham ini kepada defendan adalah sebahagian daripada tawaran pembelian habis pengurusan oleh defendan yang menguruskan hotel-hotel yang membentuk perniagaan utama plaintif. Di bawah terma-terma perjanjian utama, saham-saham tersebut telah didaftarkan atas nama defendan berdasarkan asas bayaran tertangguh terhadap penyampaian jaminan bank tidak boleh batal untuk harga belian tersebut. Adalah menjadi terma perjanjian utama bahawa harga belian hendaklah dibayar sepenuhnya dalam masa 12 bulan dari tarikh penyempurnaan, iaitu pada dan sebelum 16 Oktober 1997. Pada 16 Oktober 1996, saham-saham tersebut telah didaftarkan atas nama defendan berdasarkan persetujuan bahawa defendan hendaklah membayar harga belian pada tarikh yang dipersetujui. Walau bagaimanapun, defendan gagal untuk membuat bayaran dan pihak-pihak telah memeterai perjanjian tambahan pada 14 Oktober 1997 ('PT pertama') di mana plaintif telah memberikan defendan lanjutan selama satu tahun iaitu 16 Oktober 1998, untuk membayar. Walau bagaimanapun, sebelum tarikh tamat, pihak-pihak telah memeterai perjanjian tambahan kedua ('PT kedua'), di mana defendan telah diberikan lanjutan setahun sekali iaitu 16 Oktober 1999 untuk membayar harga belian dan faedah berjumlah RM19,882,815.31. Apabila defendan telah gagal untuk memenuhi komitmen untuk membayar harga belian, pihak-pihak telah memeterai perjanjian penyelesaian pada 22 Oktober 2001. Adalah menjadi terma perjanjian ini bahawa jualan dan belian saham-saham ditamatkan dan bahawa defendan memindah milik semula saham-saham kepada plaintif. Semasa tempoh antara 1996 dan 2001, defendan telah menerima jumlah sebanyak RM100,527,73512 sebagai dividen daripada saham-saham tersebut. Plaintif kemudian memfailkan saman pemula terhadap defendan di mana ia memohon, antara lain, deklarasi bahawa

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defendan telah memegang saham-saham amanah untuk dan bagi pihak plaintif bagi tempoh Ogos 1996 sehingga 7 Disember 2001 ('tempoh relevan'); deklarasi bahawa sebarang amaun yang diterima oleh defendan sebagai dividen ke atas saham-saham dipegang oleh defendan sebagai pemegang amanah konstruktif untuk plaintif; dan bahawa defendan untuk membayar kesemua dividen yang diterima olehnya daripada saham-saham semasa tempoh relevan kepada plaintif. Apabila Mahkamah Tinggi memberikan plaintif relief yang dipohon, defendan telah membuat rayuan kepada Mahkamah Rayuan. Mahkamah Rayuan telah menolak rayuan tersebut. Kedua-dua Mahkamah Tinggi dan Mahkamah Rayuan memutuskan bahawa adalah tidak berpatutan bahawa defendan telah membuat tuntutan terhadap dividen bersama saham-saham semasa tempoh relevan apabila ia tidak membayar untuk saham-saham tersebut, Oleh itu, kedua-dua mahkamah ini telah memutuskan bahawa plaintif sebagai pemilik benefisiari saham-saham berhak terhadap dividen-dividen daripada saham-saham semasa tempoh relevan tersebut. Defendan kemudiannya memohon kebenaran untuk meneruskan rayuan terhadap keputusan Mahkamah Rayuan. Defendan berhujah bahawa semasa mengemukakan jaminan bank kepada plaintif, transaksi telahpun disempurnakan dan plaintif seharusnya memindah milik saham-saham kepada defendan. Oleh demikian, defendan menghujahkan bahawa kedua-dua faedah perundangan dan benefisiari dalam saham-saham telah dipindahkan kepada defendan dan bahawa plaintif hanyalah berhak untuk harga belian saham-saham dan bukan dividen-dividen. Defendan bergantung kepada s 55 Akta Jualan Barangan 1957 ('AJB') untuk menyokong hujahan tersebut.

Diputuskan, menolak rayuan dengan kos:

(1) Di bawah perjanjian utama, defendan diperlukan untuk mengemukakan kepada plaintif jaminan bank untuk amaun bersamaan dengan harga belian tetapi jaminan bank ini akan dipulangkan kepada defendan selepas bayaran penuh harga belian. Justeru jaminan bank tersebut hanya suatu bentuk sekuriti untuk pembayaran penuh harga belian dan bukan dimaksudkan untuk dianggap sebagai bayaran penuh harga belian. Selanjutnya perjanjian utama juga memperuntukkan bahawa sekiranya defendan gagal membuat bayaran penuh harga belian, plaintif berhak untuk menamatkan perjanjian dan bahawa setelah penamatan tersebut defendan harus memindah milik saham-saham semula kepada plaintif (lihat perenggan 20).

(2) Sebagai peraturan am saham-saham harus, dalam ekuiti, menjadi hartanah defendan pembeli setelah kontrak untuk belian ditandatangani. Walau bagaimanapun, peraturan ini tidak digunapakai dalam kes ini. Ini adalah kerana daripada maksud umum perjanjian, ia bukanlah niat pihak-pihak bahawa faedah benefisiari dalam saham untuk dipindahkan kepada defendan tanpa pembayaran penuh harga belian oleh defendan (lihat perenggan 22).

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(3) Untuk menggunapakai s 55 AJB, hartanah dalam barangan seharusnya dipindahkan kepada defendan pembeli. Walau bagaimanapun, dalam kes ini, adalah jelas bahawa saham-saham tidak pernah dimaksudkan untuk dipindahkan kepada defendan, kecuali setelah pembayaran penuh harga belian. Oleh itu, s 55 AJB tidak boleh diaplikasikan dalam kes ini (lihat perenggan 25–26).

(4) Hujahan defendan bahawa memandangkan perjanjian penyelesaian tidak menyatakan apa-apa mengenai isu dividen-dividen yang diterima oleh defendan daripada saham-saham, dan adalah menjadi niat pihak-pihak untuk membenarkan defendan menyimpan dividen yang diterima sebelum tarikh perjanjian penyelesaian, tidak boleh dikekalkan. Adalah didapati bahawa memandangkan defendan tidak mempunyai sebarang faedah benefisiari dalam saham-saham dia tidak boleh menuntut faedah benefisiari dalam dividen-dividen tersebut. Justeru sebarang perjanjian untuk melenyapkan hak plaintif terhadap dividen-dividen seharusnya dinyatakan dalam terma yang jelas di dalam perjanjian penyelesaian dan klausa pelepasan umum tidak akan menghalang plaintif untuk membuat tuntutan terhadap dividen (lihat perenggan 28).]

Notes:

For cases on intention of parties, see 3(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 3715–3738.

Cases referred to

Agricultural Market Committee v Shalimar Chemical Works Ltd [1997] 5 SCC 516 (refd)

Amfinance Bhd v KT Steel Sdn Bhd & Ors [2007] 7 MLJ 749; [2008] 1 CLJ 290, HC (refd)

Aqua Logistics Pte Ltd v. Sasacom Sdn Bhd [2008] 8 CLJ 405, HC (refd)

Bank of Credit and Commerce International SA v Ali [2002] 1 AC 251 (refd)

Directors, The & C, of the London and South Western Railway Company and George Clement v Richard Doddridge Blackmore (1870) LR 4 HL 610 (refd)

Eves v Eves [1975] 3 All ER 768, CA (refd)

Ezzen Heights Sdn Bhd v Ikhlas Abadi Sdn Bhd (Soo Yuh Mian — Intervener) [2011] 2 AMR 281 (refd)

Grant v John Grant & Sons Proprietary Ltd (1954) 91 CLR 112 (refd)

Lindo v Undo (1839) 1 Beav 496 (refd)

Lyall and Another v Edwards and Matthie (1861) 6 H&N 337 (refd)

McEntire v Crossley Bros Ltd [1895] AC 457, HL (refd)

Mostcash plc & Others v Fluor Ltd [2002] EWCA Civ 975 (refd)

Ogg & Another v Shuter (1875) LR 10 CP 159 (refd)

Parway Estates Ltd v Commissioners of Inland Revenue (1958) 45 TC 135 (distd)

Payler & Others v Homersham (1815) 4 M&S 423; 105 ER 890 (refd)

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Pemunya Kargo atas Kapal 'Istana VI' v Pemilik Kapal atau Vesel 'Filma Satu' dari Pelabuhan Jakarta Indonesia and other actions [2011] 7 MLJ 145, HC (refd)
Sanmaru Overseas Marketing Sdn Bhd & Anor v PT Indofood Interna Corp & Ors [2009] 2 MLJ 765, CA (refd)
Westdeutsche Landesbank Girozentrale v Islington London Borough Council [1996] AC 669, HL (refd)

Legislation referred to

Sale of Goods Act 1957 ss 19, 55, 55(1)

Appeal from: Civil Appeal No W–02–1063 of 2007 (Court of Appeal, Putrajaya)

Porres Royan (Shook Lin & Bok) for the appellant.
Robert Lazar (TT Toi with him) (Shearn Delamore) for the respondent.

Arifin Zakaria CJ (delivering judgement of the court):

INTRODUCTION

[1] This is an appeal by the appellant against the decision of the Court of Appeal dated 23 August 2010 dismissing the appellant's appeal. Leave to appeal was granted by this court on 22 February 2011 on the following questions:

Question 1:

> In a contract for the sale and purchase of shares, does the beneficial ownership in shares pass to the purchaser upon delivery of the shares to and registration thereof in the name of the purchaser when the full purchase price has not been paid?

Question 2:

> In construing settlement agreements, where a claim is not expressly stipulated for by the party asserting that claim, does a general release clause bar such a claim?

In this judgment, the respondent will be referred to as the plaintiff and the appellant as the defendant, as in the trial court.

THE FACTS

[2] The facts relevant to this appeal are briefly as follows:

By an agreement dated 19 August 1996 ('the principal agreement') the plaintiff agreed to sell to the defendant 119,301,616 shares in Pernas International Holdings Bhd ('PIHB') ('the subject shares') at the agreed price of RM2.05 per share amounting to RM408,568,312.80 ('the purchase price').

[3] Pursuant to the principal agreement, the defendant provided the plaintiff

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with an irrevocable bank guarantee for the purchase price. The defendant was required to pay the purchase price to the plaintiff on or before 16 October 1997. On 16 October 1996, the subject shares were registered in the name of the defendant on the understanding that payment of the purchase price would be made on or before the agreed date. The defendant failed to make such payment.

[4] On 14 October 1997, the parties entered into a supplemental agreement ('the first supplemental agreement') whereby the plaintiff granted the defendant an extension of one year to pay up, which expires on or before 16 October 1998. However, before the due date, the parties entered into another supplemental agreement dated 29 July 1999 ('the second supplemental agreement').

[5] In the second supplemental agreement, it was agreed as follows:

(a) the plaintiff granted the defendant yet another extension of one year, and the payment to be made on or before 16 October 1999;

(b) the defendant made interest payment of RM19,882,815.31 to the plaintiff by reason of the defendant's failure to pay the purchase price; and

(c) the parties agreed to open a sinking fund account in a bank or financial institution approved by the plaintiff in the joint names of the defendant and the plaintiff; and the purpose of the 'sinking fund' was to utilise the monies in that account towards the payment of the purchase price and interest.

[6] Notwithstanding the second extension, the defendant still failed to meet its commitment to make payment of the purchase price.

[7] On 22 October 2001, the parties entered into a settlement agreement whereby:

(a) the sale and purchase of the subject shares was terminated;

(b) the defendant re-transferred the subject shares to the plaintiff;

(c) the monies amounting to RM20.231,955.73m in the sinking fund account were released to the plaintiff; and

(d) all but one of the directors nominated by the defendant shall resign from the Board of Directors.

[8] During the period of some five years from 16 October 1996 to 22 October 2001, even though the defendant did not pay for the subject shares, the subject shares were registered in the defendant's name. The company, PIHB

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was controlled and managed by the defendant's representatives. This was because the sale was part of a 'Management Buy Out'.

[9] Between 8 November 1996 to 16 January 2001, the PIHB dividends were paid to the defendant being the registered holder of the subject shares, amounting to RM100,527,735.12.

THE HIGH COURT

[10] The plaintiff filed an originating summons in the Kuala Lumpur High Court against the defendant for the following reliefs:

(a) A declaration that the subject shares which were, for the period August 1996 to 7 December 2001, registered in the name of the defendant, were held by the defendant on trust for and on behalf of the plaintiff by reason of the defendant's failure or inability to pay the full consideration for the subject shares;

(b) a declaration that any sums received by the defendant as dividends that was declared on the subject shares ought to have been held by the defendant as a constructive trustee for and on behalf of the plaintiff;

(c) that an account be taken of all monies that had come into the hands of the defendant, and if the same were paid over by the defendant to any person or persons that an account of such payments be made by the defendant;

(d) for an order that the defendant to pay over to the plaintiff such monies that have come into the defendant's hands by reason of the matters aforesaid;

(e) the cost of and occasioned by this application be paid by the defendant to the plaintiff; and

(f) further and/or any other relief that the court would deem fit and just to grant.

[11] At the end of the trial, the learned trial judge found for the plaintiff and held that:

> ... the registration of the subject shares in the defendant's name merely confers legal ownership on the defendant but not the beneficial interest which remained with the plaintiff. Since the defendant failed to pay as agreed in all the relevant agreements between the parties, the subject shares were held on trust by the defendant for and an (sic) on behalf of the plaintiff. Therefore the dividend that accrued on the subject shares during the five years period must be paid over to the plaintiff.

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A THE COURT OF APPEAL

[12] On appeal, the Court of Appeal narrowed down the issue in the appeal to this:

B

> Given the above factual background, was the defendant holding the shares on constructive trust for the plaintiff so that the plaintiff has a claim in equity against the defendant in respect of the dividends received by the defendant?

[13] On this issue, the Court of Appeal held as follows:

C

> We find that in *Parway Estates Ltd*, the distinguishable fact which is of critical importance is that the transfers were executed in consideration of the payment of the sum due under the agreement In effect, that authority militates against the defendant herein. The defendant had never paid the purchase price to the plaintiff to support the transfer of the shares. Clearly, no equitable and beneficial interest in the shares can ever become vested in the defendant. If at all, only the legal ownership was vested in the defendant, and the defendant was holding the shares on constructive trust for the plaintiff. The defendant, being the plaintiff's constructive trustee, was in no position whatsoever to beneficially claim the dividends declared for the shares. In equity, the defendant was accountable to the plaintiff for the dividends.

D

E

[14] The Court of Appeal also asked this question:

> Would the retention of the dividends by the defendant, as purchaser of the shares, without paying the purchase price therefore, amount to unjust enrichment?

F

[15] On this issue, the Court of Appeal held as follows:

> The doctrine of unjust enrichment applies to the facts in the instant appeal, more specifically when the defendant has never paid the purchase price for the shares, in which case, the defendant is not entitled to retain the dividends declared for the shares. The plaintiff has proved that the defendant has been unjustly enriched at the plaintiff's expense. The plaintiff has the right to recover the dividends from the defendant by way of restitution as it is unjust for the defendant to keep them. We therefore answer the above question in the affirmative.

G

H

[16] At the end of the hearing of the appeal, the Court of Appeal dismissed the defendant's appeal with costs.

I THE ISSUES BEFORE THIS COURT

[17] This court had on 22 February 2011 granted leave to the defendant to appeal against the decision of the Court of Appeal on the questions of law set out earlier.

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[18] The answer to the questions posed to us turns essentially on the construction to be given to the agreements entered between the parties starting with the principal agreement and culminating with the settlement agreement. The main thrust of the defendant's case was that under cl 5.1 of the principal agreement, the plaintiff was to deliver to the defendant the PIHB shares certificate together with the documents required to give good title 'upon payment of the Purchase Price in accordance with Clause 5.1(c)' of the principal agreement.

[19] What concerns us here is the dividends that were paid out to the defendant between 8 November 1996 to 16 January 2001, totalling RM100,527,735.12.

[20] The issue is whether the plaintiff is entitled to the dividends upon the termination of the agreement pursuant to the settlement agreement dated 22 October 2001. The answer to this depends on the terms of the various agreements between the parties. It is not in dispute that the sale of the subject shares to the defendant was part of 'Management Buyout Offer' by the defendant who was managing the hotels which formed the core business of PIHB. It is not an outright sale of shares. The subject shares were registered in the name of the defendant on a deferred payment basis against delivery of a bank guarantee. Looking at cll 4.4 and 4.5 of the principal agreement, we are of the view that the bank guarantee was not intended to be treated as payment of the full purchase price for the subject shares. The full purchase price shall be paid by the defendant on or before the date falling 12 months from the completion date. Clause 4.5 of the principal agreement requires the defendant, on the completion date, to furnish to the plaintiff a bank guarantee for an amount equivalent to the full purchase price. The bank guarantee will be returned to the defendant upon payment of the full purchase price. Thus, it is amply clear that the bank guarantee cannot be treated as payment of the full purchase price as contended by learned counsel for the defendant. It is merely a form of security for payment of the full purchase price. Further, cll 11.1 and 11.2 of the principal agreement provide that, in the event the defendant defaults in making full payment of the purchase price, the plaintiff is entitled to terminate the agreement and upon such termination, the defendant shall transfer the subject shares back to the plaintiff.

[21] As it turns out, no payment was made within the period stipulated in the principal agreement and in the two supplemental agreements. By the second supplemental agreement, the date for payment was finally extended to 16 October 1999. But no payment was made and the principal agreement was eventually terminated pursuant to the settlement agreement dated 22 October 2001. Two important provisions in the settlement agreement were that:

(a) The subject shares were transferred back to the plaintiff; and

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(b) The monies in the sinking fund account amounting to RM20,231,955.73 were released to the plaintiff.

[22] In this case, the defendant seeks to rely on the general principle as stated in *Parway Estates Ltd v Commissioners of Inland Revenue* (1958) 45 TC 135, where Jenkins LJ stated, 'once a contract for sale is executed, the subject-matter — the shares in the present case — becomes in equity the property of the purchaser'. But in that case, the learned LJ did observe that 'there is nothing in this agreement to take the case out of the general rule'. Therefore, the learned LJ did anticipate that, depending on the particular circumstances, a case may be taken out of that general principle. Is this present case one such case? We would have thought so. This is because from the general tenor of the agreement, it was never the intention of the parties that the beneficial interest in the subject shares was to pass to the defendant upon the transfer of the subject shares to the defendant without the full payment of the purchase price. It is the term of the agreement that the full purchase price shall be paid on or before the date falling twelve months from the completion date. Unless and until that payment is made, we do not think, it is the intention of parties that the beneficial interest in the subject shares were to pass to the defendant, bearing in mind that the defendant has not made any payment towards the purchase price of the subject shares. In *Parway Estates Ltd*, the obligations were on the vendors to perform before they could call upon the purchaser to pay the purchase money. Therefore, on the facts, *Parway Estates Ltd* is clearly distinguishable from the present case.

[23] From the principal agreement, it would appear that the defendant was given the right to manage the PIHB prior to payment of the purchase price of the subject shares. The transaction in the present case, as we understand it, is a management buyout scheme, whereby the managers of a corporate entity buy the subject shares in that entity (see plaintiff's second affidavit). It is also to be noted that by the terms of the principal agreement itself, the defendant was not free to deal with the subject shares and in the event the defendant failed to make payment of the full purchase price, the defendant may be required to re-transfer the subject shares to the plaintiff (*see cl 11.2 of the principal agreement*).

[24] On those factual matrix, both the High Court and the Court of Appeal held it is highly unconscionable on the part of the defendant to lay a claim on the dividends attached to the subject shares during the relevant period when the defendant had not at all paid for the subject shares. It is their concurrent findings that in the circumstances, equity would construct a trust in favour of the plaintiff as regards the dividends. The plaintiff as beneficial owner of the subject shares is therefore entitled to the said dividends. *Eves v Eves* [1975] 3 All ER 768; *Sanmaru Overseas Marketing Sdn Bhd & Anor v PT Indofood Interna*

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Corp & Ors [2009] 2 MLJ 765; *Ezzen Heights Sdn Bhd v Ikhlas Abadi Sdn Bhd (Soo Yuh Mian — Intervener)* [2011] 2 AMR 281; and *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 (HL) were cited in support of their decision. Having considered all the relevant facts and circumstances in this case, we are of the view that both the courts below had come to a correct finding.

[25] Learned counsel for the defendant further contended that cl 5.1(c) stipulates that the defendant is to deliver to the plaintiff 'an irrevocable Bank Guarantee for the amount equal to the full purchase price', therefore, upon furnishing the bank guarantee to the plaintiff, the transaction was completed and the plaintiff was to transfer the subject shares to the defendant. With that transfer, learned counsel maintained that both the legal and the beneficial interest in the subject shares passed to the defendant, and the relationship between the defendant and the plaintiff became that of creditor and debtor. Hence, the plaintiff is only entitled to the purchase price of the subject shares, and in the event of default by the defendant, the only remedy open to the plaintiff is to claim for the same. Learned counsel relied on s 55 of the Sales of Goods Act 1957 (Revised 1989) ('the Act') in support of his contention. Section 55(1) of the Act reads:

> 55 Suit for price
>
> (1) Where under a contract of sale the property in the goods has passed to the buyer and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may sue him for the price of the goods.

It is not in dispute that under the Act, 'shares' come within the definition of the word 'goods'. But for s 55(1) of the Act to apply, we have to be satisfied that the property in the goods has passed to the purchaser pursuant to the contract. To determine whether the property in the goods has passed to the purchaser, regard must be had to s 19 of the Act, which reads:

> 19 Property passes when intended to pass
>
> (1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.
>
> (2) For the purpose of ascertaining the intention of the parties *regard shall be had to the terms of the contract the conduct of the parties and the circumstances of the case.* (Emphasis added.)

This section is a codification of the common law principle as enunciated in *Ogg & Another v Shuter* (1875) LR 10 CP 159. In that case, Lord Coleridge CJ observed, 'The rule as deducible from all the cases, and as it is laid down in the learned works of Mr Justice Blackburn and Mr Benjamin on Sale, is, that the question whether the property has passed being one of intention to be collected

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from all the circumstances, no single circumstance is necessarily conclusive in all cases, but the conclusion to be drawn must depend on a balance of the various circumstances on one side and the other' (see also *McEntire v Crossley Bros Ltd* [1895] AC 457 and *Agricultural Market Committee v Shalimar Chemical Works Ltd* [1997] 5 SCC 516). Section 19 of the Act was applied in our court in a number of cases (see *Pemunya Kargo atas Kapal 'Istana VI' v Pemilik Kapal atau Vesel 'Filma Satu' dari Pelabuhan Jakarta Indonesia and other actions* [2011] 7 MLJ 145; *Amfinance Bhd v KT Steel Sdn Bhd & Ors* [2008] 1 CLJ 290; and *Aqua Logistics Pte Ltd v Sasacom Sdn Bhd* [2008] 8 CLJ 405).

[26] In the present case, based on what we have alluded to earlier, it is evident that the subject shares were never intended to pass to the defendant, save upon payment of the full purchase price. Therefore, we are of the view that s 55(1) of the Act could not apply to this case.

[27] The second question posed to us is whether the plaintiff is precluded by the settlement agreement from bringing a claim against the defendant for the dividends paid prior to the settlement agreement. Much reliance was placed on cll 3.3 and 9.1 of the settlement agreement which read:

> 3.3 The parties hereto further agree that upon the completion of the matters set forth in Clause 3.2 (a) to (d), neither parties shall have any further rights or claims against the other and in particular, the Total Outstanding shall for all intents and purposes be deemed repaid to PNS upon completion of the matters set forth in Clause 3.2, and PNS shall have no further claim against Fernrite in respect of the Purchase Price or Accrued Interest.
>
> ...
>
> 9.1. Upon completion of this Agreement, in particular, upon completion of the matters set out under Clause 3.2 above, the parties hereto agree that neither party shall have any further action or claim against the other in respect of any matter arising out of this Agreement or the Principal Agreements.

It is the defendant's submission that cl 9.1 (the release clause) of the settlement agreement is wide enough to cover any claim for dividends received by the defendant prior to the date of the settlement agreement. It is common ground that a sum of RM100,527,735.12 was received by the defendant as dividends in respect of the subject shares. And during the currency of the agreements the defendant had made a total payment of RM60,042,095.99, made up of:

(a) RM39.711,305.98 payment of overdue interests; and

(b) RM20,330,790.01 being part of the dividends payment paid out of the sinking fund account.

[28] In law, no particular form or word is necessary to constitute a valid release, and any words which show an evident intention to renounce a claim or

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discharge the obligation are sufficient. And the normal rules relating to the construction of a written contract apply equally to a release, and so a release in general term is to be construed according to the particular purpose for which it was made (*Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251). In cl 3.3 of the settlement agreement, particular reference is made to the 'Total Outstanding' and to 'Purchase Price' or 'Accrued Interest'. The words 'Total Outstanding' are in turn defined as '... the aggregate of the Purchase Price and the Accrued Interest amounting to Ringgit Malaysia Five Hundred and Eighty Eight Million Two Hundred and Twenty Seven Thousand, One Hundred and Fifteen and Sen Twenty Five (RM588,227,115.25) only'. Therefore, the focus of the settlement agreement was principally on the purchase price or/and accrued interest. The issue of dividends received by the defendant during the pendency of the agreement was not anywhere mentioned in the settlement agreement. Clause 5.1 of the settlement agreement encompasses the right to dividends subsequent to the settlement agreement. It was contended for the defendant that since the settlement agreement was silent on the issue of past dividends, therefore, it was the intention of the parties to allow the defendant to keep the dividends received prior to the date of the settlement agreement. However, in view of our finding that the defendant has no beneficial interest in the subject shares, therefore, it necessarily follows that, the defendant could not likewise claim beneficial interest in the dividends. Thus, any agreement to extinguish the plaintiff's right to the dividends ought, in the circumstances, to be expressed in clear and unequivocal terms in the settlement agreement: a general release clause as in the present case in our opinion, would not be sufficient to extinguish such a right. In *The Directors, & C, of the London and South Western Railway Company and George Clement v Richard Doddridge Blackmore* (1870) LR 4 HL 610, it was observed that, 'The general words in a release are limited always to that thing or those things which were specially in the contemplation of the parties at the time when the release was given. But a dispute that had not emerged, or a question which had not at all arisen, cannot be considered as bound and concluded by the anticipatory words of a general release' per Lord Westbury, (see also *Mostcash plc & Others v Fluor Ltd* [2002] EWCA Civ 975; *Grant v John Grant & Sons Proprietary Ltd* (1954) 91 CLR 112; *Lyall and Another v Edwards and Matthie* (1861) 6 H&N 337; *Lindo v Undo* (1839) 1 Beav 496; and *Payler & Others v Homersham* (1815) 4 M&S 423 [105 ER 890]). For these reasons, our answer to the second question would be that the release clause in the present case is not sufficiently clear so as to bar the plaintiff from making a claim to the dividends.

[29] The Court of Appeal further found in favour of the plaintiff on the principle of unjust enrichment. The Court of Appeal opined that the defendant would be unjustly enriched if it was allowed to retain the dividends which were derived from the subject shares when the defendant has never paid the purchase price for those shares. Before us, learned counsel for the defendant

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argued that the principle of unjust enrichment has no application to the present case. In view of our earlier findings, we do not think it is necessary for us to consider this issue.

[30] For the reasons stated above, we accordingly dismiss the appeal by the defendant with costs. We will now invite counsel to address us on the issue of costs.

Appeal dismissed with costs.

Reported by Kohila Nesan